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REVISION OF OUR CRIMINAL LAWS.

"*Hereafter, criminal trials will be upon the merits, and the merits alone.*"—ARCHBOLD."

Now that our legislature is in session, desiring to do many good things, it is proposed in this paper to look somewhat into our criminal laws, and see what proportion of evil therein is attributable to bad laws, rather than to bad courts. We hear a great deal of complaint about the uncertainty of the criminal law, and we must admit, whether we like to do so or not, that there is among our people a prevailing distrust of the certainty of punishing crime. Even among the legal profession this same feeling exists. We recollect hearing a very able lawyer and judge once say, in speaking of a case on trial, that with the able counsel engaged the chances were pretty sure that some error would be committed, by which a new trial would be secured. The public do not hesitate to say, that if a prisoner has sufficient counsel and the means to continue litigation from court to court, he will probably wear the case out by delay, and finally, though quietly, escape justice. Much of this blame is placed upon the courts, when, in fact, no judge, however learned, can escape the many technical pitfalls that encumber the way. In any case, other than the simplest, it is nearly always possible to "raise" enough points to have a reversal of the verdict, regardless of the merits. Our appellate practice is built upon the policy that unless everything appears to be right, a new trial shall be granted (and many useless things are required to appear), and further that if anything has been done, however slight, which might possibly prejudice the accused, a new trial shall be granted, whether he was in fact prejudiced or not.

England, from whence came our laws, surely had good judges, and yet worn out by these intolerable uncertainties and delays, finally in 1825 (14 and 15 Vict., ch 100), "swept away the whole mass of little points and legal subtleties," and now "criminal trials are upon the merits, and the merits alone."

Hear how Archbold, one of the greatest of English criminal law writers, speaks of this reform. It is "one of the greatest and best reforms which has ever been made, and which is not only calculated to afford great and extraordinary facilities in the administration of criminal justice, but must have a serious and beneficial effect upon the state of crime in the country. This [technical subtlety] was not a healthy or sound state of the criminal law, ... the offender exulted in his success. Nor can, nor ought, the accused to complain of trial upon the merits. If guilty, he has no right to be acquitted. If innocent, his best defence will be upon the merits." Why not let us go and do likewise?

The English Act is not before us, and it would be too long to be inserted, but if inserted, it would no doubt be a surprise to many. The proper way to amend these laws is by the appointment of a commission to revise them. This commission to take until the next session of the legislature to investigate and report. Among them should be some county court judges, as they are familiar with these laws, and no doubt would do the work without charge. However, we suggest, among other things, legislative amendments along the following lines:

GRAND JURIES.

1. Section 3977 of the Code should be amended so as to make any qualified voter a competent grand juror. There is no good reason why a 'road surveyor,' a 'constable,' or the 'owner of a grist mill' should not serve. Surely the court could be trusted to select good men. These men are already competent to serve on the trial jury, where life and death may be involved, and yet are forbidden to find the indictment which they are sitting to try. In the writer's county, there were at one time four or five hundred road surveyors, and if any one of these slipped the judicial eye, the indictment, however serious the charge, must be quashed, and the commonwealth suffer the costs and chagrin of going over the whole case, for a thing that could never have done any injury.

2. *The impaneling* of the grand jury should also be simplified, as indicated below.

3. *The finding* of the grand jury, recorded by the court, should be conclusive that the needful number concurred in the finding.

4. Such questions as qualifications of a juror, interest in the subject, prior opinions, substituting another juror, and the presence of others in the jury-room, should be eliminated.

MOTIONS AND DEMURRERS.

All motions and demurrers should be required to state the exact defect relied on. This would enable the court to correct any injustice at once. As it is, the prisoner nearly always declines to say what the objection is, so as to keep the court in the dark till the trial is over, and, if he is convicted, that he may then get a new trial for a thing which never did him any injustice on the merits, and which he deliberately withheld from the court. Formal defects should be taken in this manner alone, before the jury is sworn, with permission to amend. 1 Arch. 115.

THE INDICTMENT.

1. *Amendments.* Proper provision should be made to amend the indictment in various particulars, as, for example, to prevent a variance in the evidence, in matters of description, in dates, names, places, amounts, unknown persons or means, the ownership of property, etc. Of course reasonable limits should be put upon these amendments. For some elucidation of this subject, see 1 Arch. 15, 83, 84, 86. So, as to any statements of value, price, damage, etc. So, as to certain words, and especially technical words, as "and" for "or," and *vice versa*, "feloniously," "burglariously," "unlawfully," "as appears by the record," "maliciously," "ravish," etc. Of course, it must otherwise appear by the indictment that the offence charged was a felony or other offense, in which these technical words are required. So, with amendments as to the venue and jurisdiction. 1 Arch. 178. On an indictment for a misdemeanor, if the proof shows a felony, let the jury be discharged, and an indictment for felony found, and *vice versa*. 1 Arch. 175. Our present law and decisions somewhat cover this last point, but not satisfactorily. As an illustration of the above, can any good reason be given for a mistrial, simply because a man's name is stated in the indictment to be "James Smith" when, in fact, it is "John Smith," or, in the description of a writing, that it is for $10.43 when it was for $10.45, or that a person was killed by strychnine when he was killed by arsenic?

2. *Indictments in particular offences.* Many of these need simplifying, as, in murder, embezzlement, the larceny of money, offences against the coin, malicious injuries, and as to accessories before the fact. Take our indictment for murder. It is "verbose, prolix, and periphrastic," and charges all sorts of things, and in all kinds of manner, as, for example, that "J. A. K., late of the county aforesaid,

laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," made an assault on one T. R., and "having a certain pistol, of the value of two dollars, then and there charged with gunpowder and one leaden bullet, which pistol he, in his right hand then and there had and held, and then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did discharge and shoot off, to and against and upon the said T. R,." and that the said J. A. K., "with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said J. A. K. discharged and shot off, as aforesaid, then and there feloniously (as above) did strike, penetrate, and wound the said T. R., in and upon the back part of the head of him, the said T. R., then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by force of the gunpowder aforesaid, by the said J. A. K., in and upon the back part of the head of him, the said T. R., one mortal wound of the depth of three inches and of the breadth of half an inch, of which said mortal wound he then and there instantly died." There would be no wonder of that! "And so the jurors aforesaid, upon their oaths aforesaid," do continue to "say" on, for about three or four pages more. And then follows a count for killing by "stabbing," and another "by striking with a brickbat," and another "with an ax," and, finally, by "some means and in some manner, to the jurors aforesaid unknown," which is a fit conclusion to such a mixed-up affair. Johnson's Forms, 442.

Now, listen to the English indictment, as modified by its statute: "That A. B., on the — day of ——, feloniously, willfully, and of his malice aforethought, did kill and murder one C. D." The means and manner of death are not required. 1 Arch. 89. So with manslaughter. In malicious injuries it matters not whether the malice be toward the "owner of the property or otherwise."

Sec. 3887 of the Code should permit accessories before the fact to be indicted as principals, especially as sec. 3885 punishes them as such. 1 Arch. 94. Sec. 3994, as to embezzlements, needs enlarging and clearing up. Sec. 3995, as to descriptions of writings in forgery, should be enlarged as to writings in various other offences, and so as to permit the papers to be described by the "designation by which it is commonly known." The word "money" should be extended to cover, in any offence, any coin, bank note, or treasury note, without specifying any particular kind of coin or currency. For the sake of

uniformity, the policy already adopted in chap. 181 of the Code on "Offences against property," of "deeming" these offences larceny, should be extended to all similar cases. Thus, under our decisions, an indictment for larceny would cover all.

3. *Formal conclusions.* This is all very well, but consider the deluded state to which the legal mind was carried on technicalities when it was solemnly determined, above all things, that all indictments must conclude "against the peace and dignity of the commonwealth," or else be quashed; and so deluded on technicalities was the legal mind that this requirement had to be put into the constitution. A man could constitutionally kill any man in the community, and nothing could be done with him, unless, forsooth, he was informed that he had done so "against the peace and dignity of the commonwealth."

THE TRIAL.

1. *Summoning and empaneling the jury.* It seems that this ought to be a simple matter. If a fair and impartial jury is selected it is all that any one could ask. Yet case after case, "point" after "point," litigation following litigation, has been "raised," not on the question of a fair and impartial jury, but simply as to how they were summoned and empaneled. Sec. 3156 should be carefully revised and enlarged, making the selection of twelve fair and impartial men the test of any error. All questions, and they are too numerous to be here repeated, as to the *venire facias*, should be eliminated. The same remarks apply to summoning the grand jury.

2. *Selecting the jurors.* The commonwealth and the prisoner should each be permitted to strike off two from the panel of sixteen, in order to get rid of prejudiced or cranky jurors. This is just as important to the commonwealth, in order to insure a fair trial to it, as to the prisoner, and would save many a hung jury and the costs of a new trial. If the trial court has directed a juror to stand aside, because the court was in doubt whether he could give the commonwealth a fair trial, and in his place has substituted an unquestioned juror, the verdict should stand, and not, as the Court of Appeals has held, be reversed, simply because that court was of the opinion that the original juror could also have served. It is difficult to see how the Court of Appeals (not the present court) could ever have arrived at such a conclusion, unless it is explained by this deluded state of the legal mind "fatally bent" on technicalities. Suppose the excluded juror *was* competent, and the trial court in error, still a good juror was substituted, and the original

juror will never again serve on the new trial. So the jury *de medietate linguæ* ought to be abolished.

3. *The record and the presence of the prisoner.* Of course a prisoner ought always to be present during his trial in a felony case, unless, perhaps, when he voluntarily waives his presence by absconding, after the trial has begun. In this case the court and jury should be allowed to proceed to verdict. The record should show the presence of the accused at the arraignment and on to the judgment, except, perhaps, his presence should not be required in some motions, which his counsel can as well make without him. But authority should be given the court, or the judge in vacation, to bring the prisoner into court and to amend the record so as to show the fact that the prisoner was actually present. If the court can be trusted to make up the record, in the first instance, it can also be trusted to amend the same, in the prisoner's presence, and subject to any exceptions by him and his counsel. Nor is there any goood reason why the record should be required to show the *venire,* or the swearing of the jury on adjournment. If these things be not done let them be excepted to, but let the record be kept clear of minor details, which generally entangle justice. Let the record be amended in any particular which accords with the truth of what occurred.

4. *Separation of the jury.* No verdict should be set aside because of a separation of the jury, unless it is made to appear that injustice resulted from it. Suppose one juror is separated and influenced while away? He can only hang the jury, if for the accused, or vote for conviction if against him. Is there any sensible possibility, much less probability, that he or any one else can bribe or influence a whole jury? And why not let us deal with these things as they are, instead of with imagination?

5. *Instructions.* We need a little more good sense on this subject. For instance, setting aside a verdict because the instructions inadvertently omitted to use the words "believe from the evidence." Of course they must act from the evidence, but is it not really pitiable to think of a jury being misled, in the course of a trial, by such a thing as this, and that too, when no objection was raised by the prisoner or his counsel?

This subject of instructions cannot be treated of in such an article as this. It will have to be considered in somewhat the same manner in which new trials are considered below. But it is sufficient to say

that we get our law from the old English common law, and the judges, who propounded this law, and presided at these trials, were certainly able and learned men, yet if the charges given by these most learned men to the juries who tried their cases (and we have as intelligent juries as they) were submitted in their statement of the law to be reviewed by our appellate courts, nearly every case would be reversed. This shows too much subtlety of reason, to say the least of it. It is said that the English courts administer the laws better than ours, and it may be that we find herein the secret of it, viz: too much refining of the law. Like Job, we have been "darkening counsel by words without knowledge."

NEW TRIALS.

Our law grants a new trial wherever anything might *possibly* have been of injury to the prisoner. It matters not whether he *was* injured or not, the law steps in and says, that it will conclusively presume that he was injured, and will set the verdict aside. It is too late for the courts to change this policy. But is it sound? It seems very well theoretically, but practically it produces a great deal of useless annoyance, expense and delay. Our times are changed and crimes are increasing daily. We have about 1600 convicts to-day, as against about 300 to 400 some forty year ago. It is time to worry a little less over that "innocent man," for whom the the law has been so solicitous, and look a little more after the other ninety and nine.

Both as to instructions and new trials, the appellate courts should review the case, as on an appeal, rather than on a writ of error, keeping always clearly in mind the presumption that twelve men can be trusted to render a sensible verdict, and then reviewing all the evidence, affirm the verdict when substantial justice has been done, and reversing it when it appears that an injustice has been done. This rule would be more just to the accused and commonwealth alike, than the present arbitrary rule of looking only at the commonwealth's evidence, as is done on a writ of error.

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